

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Guy B. Hawes,

Plaintiff,

v.

Case No. 1:03cv703

University of Cincinnati, et al.,

District Judge Michael H. Watson

Defendants.

ORDER

Before the Court is the March 15, 2006 Motion of Defendant University of Cincinnati (hereinafter "Defendant") to Dismiss for Failure to Prosecute (Doc. 28). Plaintiff Guy B. Hawes (hereinafter "Plaintiff") filed a Memorandum Contra on April 5, 2006 (Doc. 29). Defendant filed a Reply Memorandum on April 17, 2006 (Doc. 30).

Defendant seeks, pursuant to Fed. R. Civ. Pro. 41(b), dismissal of Plaintiff's remaining claim for declaratory relief against it with prejudice for failure to prosecute. Defendant argues Plaintiff has not done anything to prosecute this remaining claim since the Court dismissed his claims against Diana Noelcke and Mark Faulkner on April 29, 2005 (Doc. 25). In response, Plaintiff argues Defendant filed an untimely dispositive motion complaining of the lack of discovery in this matter. While Plaintiff objects to the untimely filing, he agrees to the dismissal of this matter so long as it is without prejudice. Defendant contends it does not agree to a dismissal of this matter without prejudice and, thus, Plaintiff's request should be denied.


Fed. R. Civ. Pro. 41(b) states, in relevant part:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against

the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule...operates as an adjudication upon the merits.

Contrary to Defendant's assertion, the fact that it failed to stipulate to the dismissal of this matter without prejudice does not prevent the dismissal of this matter without prejudice by the Court pursuant to Fed. R. Civ. Pro. 41(b). Thus, upon consideration, the Court concludes dismissal of Plaintiff's remaining claim shall be **DISMISSED WITHOUT PREJUDICE** for failure to prosecute. Accordingly, the March 15, 2006 Motion of Defendant to Dismiss for Failure to Prosecute (Doc. 28) is hereby **GRANTED IN PART** and **DENIED IN PART**.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT